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No. 82-992

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

NORTH AMERICAN TELEPHONE ASSOCIATION,
Appellant,

v.

UNITED STATES OF AMERICA, AMERICAN TELEPHONE AND TELEGRAPH COMPANY and WESTERN ELECTRIC COMPANY, INC.,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

OPPOSITION TO MOTIONS TO AFFIRM

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ARGUMENT

The United States, AT&T[1] and Tandy Corporation ("Tandy") have filed motions to affirm summarily the actions of the U.S. District Court for the District of Columbia from which the North American Telephone Association ("NATA") has docketed an appeal in this Court by filing a jurisdictional statement on December 8, 1982. We submit this response to those motions.

[1]AT&T's wholly owned subsidiary Western Electric Company joined with it in that company's motion to affirm. The references to AT&T in this submission refer collectively to the parent company and its subsidiary.

In January of 1982 AT&T and the government presented the District Court with a proposal for settling their pending antitrust litigation. The negotiated settlement required that the Bell Operating Companies ("BOCs") once divested from ownership by AT&T could not engage in the manufacture or marketing of customer premises equipment ("CPE"). Judge Greene ruled, on August 11, 1982, that he would not enter the proposed settlement agreement unless the government and AT&T rewrote the consent decree to alter this term and allow the BOCs to market, but not to manufacture, CPE.

NATA believes this action to have been in error; it is that contention upon which this appeal is based. The motions for summary affirmance make two primary points. Neither has merit.

I. NATA'S APPEAL SUFFERS NO PROCEDURAL IRREGULARITY

The motions to affirm argue that NATA's appeal is infirm owing to a procedural flaw. AT&T put this position most directly:

> However, the question whether the January 8, 1982, proposal was properly rejected is not before the Court; neither the parties nor NATA have sought appellate review of that decision.

AT&T Motion to Affirm at 27.[2] We take this argument to suppose that a viable appeal of the District Court's rejection of the initially proposed settlement required the filing of a notice of appeal from either the August 11, 1982 opinion (J.A. 1-172) in which the court first signalled its dissatisfaction with the proscription of future BOC CPE marketing activities or of the August 23, 1982, opinion

[2]The United States makes essentially the same point in its Motion to Affirm at 30 n.36.

(J.A. 195-200) in which the court declined the government's entreaty to re-think that conclusion. We do not believe that the failure to appeal earlier interlocutory actions of the District Court – even if those non-final actions were properly appealable – disables NATA from achieving review of issues that can properly be said to have been merged into a final order from which an appeal was timely taken.

Appellate review of an appealable interlocutory order is not lost by the failure to take an immediate appeal:

> . . . an interlocutory appeal is permissive, not mandatory. When an appeal is not taken, the interlocutory order merges in the final judgment and may be challenged in an appeal from that judgment.

Baldwin v. Redwood City, 540 F.2d 1360, 1364 (9th Cir. 1976), *cert. denied sub nom. Leipzig v. Baldwin,* 431 U.S. 913 (1977) (citation omitted). See also *Drayer v. Krasner,* 572 F.2d 348, 353 (2d Cir.), *cert. denied,* 436 U.S. 948 (1978) ("Failure to take an authorized appeal from an interlocutory order does not preclude raising the question on appeal from the final judgment [citations omitted]. . . ."); *Citibank, N.A. v. Data Lease Financial Corp.,* 645 F.2d 333, 337 (5th Cir. 1981) (". . . a party's failure to appeal from an interlocutory order appealable as of right under § 1292(a) does not prevent review of that order upon a later appeal [citations omitted].")

The suggestions that the District Court's actions ought to be affirmed summarily because NATA has not properly perfected its appeal are devoid of any merit.

II. THE ENTRY OF AN ANTITRUST CONSENT DECREE WITHIN THE "PUBLIC INTEREST" DOES NOT CURE THE ERROR OF IMPROPER REJECTION OF OTHER TERMS FOR SETTLEMENT ALSO CONSISTENT WITH THE "PUBLIC INTEREST"

All three motions for summary affirmance urge that NATA's challenge to the District Court's rejection of the negotiated prohibition of BOC marketing of CPE has no merit because the subsequent entry of a consent decree mooted[3] or otherwise cured that legal error. The United States frames its contention on this score in the following terms:

> While the government agrees with NATA's substantive position on the sale of equipment by BOCs, the court's failure to accept the original proposal in this regard, even if erroneous, affords no legal basis for interfering with the decree subsequently entered.
>
> * * *
>
> It is the overall merit of that decree entered by the court, rather than past rulings on superseded bargains, that is at issue.

United States Motion to Affirm at 28-29, 30.

In its moving papers, the government discloses its conviction that Judge Greene's rejection of the negotiated settlement provision on future BOC marketing of CPE was both wrong and injurious:

> We believe that, in reaching this conclusion, the district court underrated the danger that the BOCs will disadvantage their competitors in interconnecting customer equipment. The court also ignored the fact that, if the BOCs are allowed to sell CPE, they will have the incentive

[3]The Tandy motion casts its argument in terms of mootness and requests dismissal of NATA's appeal on this ground. See n.5 *infra*.

> to discriminate against competitors in the installation and maintenance of equipment they sell and that such discrimination will impair competition at the manufacturing level as well.
>
> * * *
>
> In sum, we believe that the public interest would have been served better by the initial decree than by the decree subsequently agreed to by the parties and approved by the court.

United States Motion to Affirm at 29 n.35.[4] It remains, then, to understand why this error is protected from correction.

None of the motions affords a clear answer to this inquiry. So far as our research has disclosed, no court has endorsed the proposition that the entry of a consent decree consonant with the "public interest" standard of the Antitrust Procedures and Penalties Act absolves all errors commited in the process of reaching that final determination. In fact, substantial rights[5] secured by the Antitrust Penalties and Procedures Act have been violated by the

[4]In the papers filed by AT&T in the District Court, it necessarily took the position that the settlement terms originally presented to the court were within the public interest. Its motion papers in this Court do not disavow that position. Tandy's posture is different. Tandy argued in the District Court that the negotiated settlement was not in the public interest. It argues here that the modified agreement entered by the District Court is in the public interest to the extent that it permits the divested BOCs to engage in CPE marketing but contrary to the public interest in that further resources should have been left with the BOCs to assist their CPE marketing activities.

[5]Although not framed in these terms, the motions of AT&T and the United States might be read to assert that the District Court's error does not require remedy because it was harmless. The motions fail to establish that the error "do[es] not affect the substantial rights of the parties." 28 U.S.C. § 2111 (1976). See also Fed.R.Civ.P. 61.

It is plain that the erroneous rejection of the negotiated BOC restriction is not harmless in the sense of irrelevance to the outcome of

District Court's erroneous rejection of the ban on BOC marketing of CPE and NATA has the right to seek appellate cure of the error.

A. By Elevating Its Assessment of the Most Effective Remedial Scheme Over That of the Department of Justice, The District Court Violated The Antitrust Procedures and Penalties Act

We freely concede that the consent agreement entered by the District Court was in the "public interest" as that term is used in the statute.[6] The achievement of this result may not, however, be elevated above other values protected by the Antitrust Procedures and Penalties Act. The

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the case. The final judgment would have been demonstrably different but for the error.

This consideration is germane to Tandy's assertion of mootness as well. As this Court noted recently:

> In general a case becomes moot "when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." *United States Parole Comm'n v. Geraghty*, 445 U.S. 388, 396 (1980), quoting *Powell v. McCormack*, 395 U.S. 486, 496 (1969).

Murphy v. Hunt, 455 U.S. 478, 481 (1982). In the textual discussion that follows we establish that a substantial right appropriately asserted by NATA is at issue in this case. Thus, Tandy's claim of mootness fails along with the contentions of harmless error.

[6]In considering the impact of the act, it is important to have in mind that the statute nowhere suggests that a single "public interest" resolution is uniquely available for each lawsuit. The statutory standard is a broad one; there undoubtedly exist many outcomes to most pieces of antitrust litigation that would qualify as within the public interest under the act. We believe that, taken together with other settlement conditions, both the originally proposed ban on manufacture and marketing of CPE by the BOCs and Judge Greene's modification of that term qualify as in the public interest. It is not the case, however, that the statute is indifferent as between the results achieved by the two different schemes of relief. Nor does the act direct that a reviewing court treat one "public interest" outcome as statutorily equivalent to the next.

Antitrust Procedures and Penalties Act was adopted to secure appropriate public and judicial participation in the consent decree settlement of government antitrust cases. The statute defines and closely contains the role to be played by the judiciary in applying the public interest standard:

> We cannot agree that a district court should engage in an unrestricted evaluation of what relief would best serve the public.
>
> The balancing of competing social and political interests affected by a proposed decree must be left, in the first instance, to the discretion of the Attorney General . . . . The court is not required to determine whether a particular decree is the one that will best serve society . . .

United States v. Bechtel Corp., 648 F.2d 660, 666. (9th Cir.), *cert. denied sub nom. Bechtel Corp. v. United States*, 454 U.S. 1083 (1981).

Judge Greene violated this standard of deference to the reasonable judgment of the Department of Justice. The District Court's rejection of the prohibition on CPE marketing by the BOCs recognized the "conceptual neatness", J.A. at 98, of the government's remedial approach but insisted that a relaxation of the relief negotiated by the Department of Justice would better serve the ends of competition.[7] The court was persuaded

[7] Judge Green's rationale was that the addition of the BOCs as CPE marketing competitors would make those markets more competitive. In line with this perception, the court accorded the divested BOCs more latitude than had been proposed by the government. The court's actions removes any available support for Tandy's assertion that a more than customarily active judicial role was warranted in this case owing to hints of previous governmental subservience to the wishes of AT&T. Any suspicion of government connivance with AT&T on the question of BOC CPE marketing is relieved by Judge Greene's finding that:

that the government had overstated the danger of future anticompetitive activities by the divested BOCs.

Assessment of the danger of future BOC abuse of monopoly power involves the exercise of "judgment and prediction rather than pure factual determination", *FCC v. WNCN Listeners Guild,* 450 U.S. 582, 594 (1981), as to which the Department of Justice's vision ought to predominate.[8] The Antitrust Procedures and Penalties Act insists that where the Department of Justice has negotiated a settlement consistent with the public interest, that agreement, and not a different one dictated by the "judgment and prediction" of the judiciary, should be entered. It is this result that NATA's appeal seeks to achieve.[9]

> It appears that the Department is the principal proponent of the restrictions on the Operating Companies. AT&T has generally taken the stance that it agreed to these restrictions as part of the overall settlement.

J.A. at 98 n.227.

[8]Tandy's reliance on the familiarity of the District Court with the substance of the underlying antitrust violations as an apology for elevated judicial involvement is not apt in this case. The obvious mastery that Judge Greene established over complex facts and theories is not likely to extend to the future actions of companies newly created by the settlement agreement. There can be no evidence but only informed judgment concerning the gravity of the risk of anticompetitive conduct on which the government based its demand for a ban on BOC CPE marketing activities.

[9]A collateral argument raised by AT&T is inapplicable to NATA's appeal. AT&T notes that:

> Because the provisions of the decrees are interrelated and represent a single bargain, appellate courts are "powerless to rewrite the provisions of a settlement agreement" lest they change a provision that was essential to one party's assent.

AT&T Motion to Affirm at 26 (citations omitted). This concern is misplaced where the primary parties have previously agreed to the

B. The District Court's Subsequent Entry of A Consent Decree Does Not Preclude NATA's Appeal

The argument in the motions to affirm that the achievement of a correct outcome – defined as a settlement agreement in the public interest – cures all antecedent error is too facile in another sense. The government's motion tacitly advances the argument that only the signatories to the settlement agreement possessed the power to challenge Judge Greene's failure to enter the negotiated settlement agreement. United States Motion to Affirm at 29-30. Upon the decision of those parties to acquiesce to the District Court's demands, the government concludes, the opportunity to challenge the judge's error is lost. *Id.*

An intervenor has the right to appeal "from any order adversely affecting the interest that served as a basis for intervention." *Cerro Metal Products v. Marshall,* 620 F.2d 964 (3d Cir. 1980). NATA possesses two such interests in this case. The first centers on the interest of its members to be free from anticompetitive abuses. Although we cannot establish with mathematical certainty that the decree entered by the District Court will be less effectively protective of this interest than the provision preferred by the government, such proof is not necessary. *Bryant v. Yellen,* 447 U.S. 352, 366-368 (1980). The likelihood of superior protection under the BOC marketing prohibition erroneously supplanted by the District Court supplies a sufficient basis for NATA's appeal.

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relevant settlement terms. Similarly, AT&T's reading of NATA's appeal as a request that the August 24 decree "be vacated in its entirety", *id.* at 27, supposes the necessity of relief neither requested nor thought appropriate by NATA. If this Court agrees with our contention that Judge Greene was wrong in his rejection of the ban on CPE marketing by BOCs, the August 24 order need be reformed, only by restoring a settlement term previously agreed to by AT&T and the government.

As a participant in the Antitrust Procedures and Penalties Act proceedings in the District Court, NATA also has a stake in the procedural regularity of the District Court's actions. The right of public scrutiny of and participation in antitrust settlements would be hollow indeed if the signatories to an agreement could shield procedural errors from review and correction by their acquiescence to such flaws.

Surely, both the quality of protection achieved by and integrity of the decisional process leading to the entry of antitrust consent decrees are "arguably within the zone of interests to be protected or regulated by the statute . . . in question." *Association of Data Processing Serv. Orgs., Inc. v. Camp,* 397 U.S. 150, 153 (1970).

CONCLUSION

The motions for summary affirmance should be denied.

Respectfully submitted,

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*The statement required by Sup. Ct. R. 28.1 appears as n.5 of NATA's Jurisdictional Statement.